No. 153.

Reply Brf. of Kingsley for P.

Filed Oct. 28, 1898.

IN

THE SUPREME COURT

OF THE

UNITED STATES.

J. K. MULLEN AND CHARLES D. MCPHEE,
Plaintiffs in Error,
vs.
THE WESTERN UNION BEEF COMPANY,
Defendant in Error.

October Term, 1898
No. 153.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.

D. J. KELLY, PRINTER, DENVER.

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J. K. MULLEN AND CHARLES D. MCPHEE, *Plaintiffs in Error,* vs. THE WESTERN UNION BEEF COMPANY, *Defendant in Error.*	*October Term, 1898* *No. 153.*

REPLY BRIEF OF PLAINTIFFS IN ERROR.

In our opening brief we contended:

First—That the judgment we ask to have reversed was rendered by the highest court in the State of Colorado in which a decision in this suit could have been had.

Second—That when the Court pronounced such judgment a decision of a Federal question was necessary to the determination of the case, and that such question was actually decided adversely to the plaintiffs in error.

Third—That such decision was erroneous.

We have been furnished with a copy of a motion to dismiss and the brief of the defendant in

error. The motion to dismiss is based upon two grounds, hereinafter stated.

Having anticipated this motion, we have answered it fully in our opening brief, but deem it proper now to answer the views urged by the defendant in its brief in support of the motion.

The grounds urged in support of this motion to dismiss are as follows:

"*First*—This Court has no jurisdiction to pass upon the questions raised in said cause, for the reason that the said cause was not heard and determined by the highest court of the state of Colorado having jurisdiction thereof, the said cause having been commenced in the District Court of Arapahoe county, Colorado, and determined in favor of the defendant, The Western Union Beef Company, and thereupon said cause was taken by writ of error to the Court of Appeals of the state of Colorado, where the judgment of the District Court of Arapahoe county was confirmed; thereupon the plaintiffs in error sued out a writ of error to this Court, when, under the constitution and laws of the state of Colorado, the Supreme Court of said state had full and complete jurisdiction thereof, and a writ of error could have been sued out to the Supreme Court of the state of Colorado, and until such writ of error was sued out this Court had no jurisdiction to hear and determine the same; all of which facts appear upon the record in this case.

"*Second*—This Court has no jurisdiction to pass upon said writ of error, for the reason that all of the Federal questions raised in said cause in said courts of Colorado were decided in favor of the plaintiffs in error, the said Federal questions con-

sisting of certain rights claimed by J. K. Mullen and C. D. McPhee, the plaintiffs in error, under certain acts of Congress creating the Bureau of Animal Industry and rules and regulations made by the Department of Agriculture, and all of the rights and immunities claimed under and by virtue of said statutes were decided in favor of the said J. K. Mullen and C. D. McPhee, as will more fully appear by the record in said cause."

It seems difficult, without mere repetition of what is stated in our opening brief, to show the clear fallacy of this contention on the part of the defendant in error. Certainly it is too clear to require argument that the judgment in this case was pronounced by the highest court of the state having jurisdiction, unless, in the language of the statute creating the court, "the construction of a provision of the Constitution of the United States was necessary to a decision of the case." True it is that the trial court, as well as the Court of Appeals, reached a decision in this case without "a construction of a provision of the Constitution of the United States," and, in fact, without any reference whatever to this Constitution. It is beyond our comprehension how it can be urged that such construction of the Constitution was *necessary* when, as a matter of fact, both courts expressly ignored such construction. This I find to be one of the contentions in the very able brief of the opposing counsel, which it is difficult to consider at length because the contrary of such contention seems to us so self-evident.

Opposing counsel say that "the construction of a provision of the Constitution of the United

States was necessary to the decision of the case." Both of the judicial tribunals which have been called upon to decide the controversy have absolutely refused to furnish any construction whatever of this Constitution, but have reached their conclusions by another and entirely different route.

The fallacy of this contention on the part of the defendant in error is conclusively shown by the decision of this Court in the case of *Bacon vs. The State of Texas*, 163 U. S., 207, cited on another point, however, by the defendant in error in its brief. The answer of the defendants in that case based their defense expressly upon the point that the statute of Texas, under which the state claimed was, under the Constitution of the United States (Article II, Section 10, Subdivision one), void because affecting vested rights. But the trial court, as well as the appellate court, determined the controversy without considering this constitutional question, and so this Court held that no Federal question was involved in the case, thereby establishing the doctrine for which we contend, that it was for the court that decided this case and not for the counsel for the defendant in error to determine the question whether "the construction of a provision of the Constitution of the United States was necessary." And, having decided this question in the negative, the judgment of the Court of Appeals in this case was final under the statute creating such court.

Suppose the plaintiffs, in error *had* taken this case from the Court of Appeals to the Supreme Court of this state and the defendant in error had there moved to dismiss for want of juris-

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A late case of this Court decisive of this question is Muse vs Arlington Hotel Co., 168 U S 430.

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diction upon the ground that "the construction of a provision of the Constitution of the United States was *not* necessary to a decision of the case;" what reply could the plaintiffs in error have made to such motion? How could they then say that such construction *was* necessary, when the record distinctly showed the contrary? And how, therefore, could the jurisdiction of our Supreme Court have been sustained? The plaintiffs in error were not required to do a useless thing by taking an appeal to the Supreme Court of the state when such court could have no jurisdiction, and the cases cited in the brief of the other side sustain no such contention.

The cases of *Fisher vs. Perkins*, 122 U. S., 522, and *Bacon vs. The State of Texas*, 163 U. S., 207, cited by opposing counsel, are based upon state legislation which vested a *discretion* in the Supreme Court of the state to entertain jurisdiction, and which court, therefore, had to be first resorted to and jurisdiction declined before a writ of error from this court would lie to the lower court which rendered the judgment; whereas, in this state, no such discretion exists in the Supreme Court of the state of Colorado, as will be seen upon examination of the statute which is quoted in our opening brief. And, therefore, no attempt was necessary to take this case to the Supreme Court of the state and there have it dismissed for want of jurisdiction.

The cases of *McComb vs. Knox County*, 91 U. S., *The Great Western Telegraph Co. vs. Burnham*, 162 U. S.; and *Levy vs. Superior Court*, 167 U. S., cited in the brief of opposing counsel, are not in point upon this question.

Second; opposing counsel say that whatever Federal question there may have been in this case has been decided in favor of the plaintiffs in error. This contention, like the preceding one, has been fully answered in our opening brief; but it is now said by the other side that the plaintiffs in the trial court, and plaintiffs in error here, failed to properly except to the charge of the Judge, and, therefore, cannot now complain of the instructions given by the Court as to the rules and regulations which we allege were violated.

To this we answer:

First, that at the close of the trial the plaintiffs presented to the Court four instructions, with a request that they be given to the jury, every one of which was refused by the Court, and an exception to such refusal duly taken. (Printed record, 251.)

Second, the refusal of the first and fourth of these instructions was manifest error, and the second and third were, in substance, covered by the charge of the Court.

The rules and regulations made under the Act of Congress by the Agricultural Department have the same force and effect as though made by the president.

Woolsey vs. Chapman, 101 U. S., 755.
Wilcox vs. McConnell, 13 Pet., 498.

Such rules and regulations have the force and effect of law, and their violation is *prima facie* negligence, or negligence *per se*.

Beisel vs. New York Central Co., 14 Abb. Pr. Reports, N. S., 35.
II. Thompson on Trials, Sec. 1719.

Chicago R. R. Co. vs. Elmer, 67 Ill., 177.
Karle vs. Kansas R. R. Co., 55 Mo., 476.
Sherman & Redfield on Negligence, 3d Ed., p. 16, Sec. 13a.
Moody vs. Osgood, 60 Barb., 644.
I. Thompson on Negligence, 506, Sec. 8.
Seimers vs. Eison, 54 Calif., 418.
Central R. R. Co. vs. Smith, 78 Ga., 694.
Peper vs. Chicago, 46 N. W. Reporter (Wis.), 165.

And while the latest decisions in New York may not fully sustain this proposition, this is the law of most of the states and also of Colorado.

Denver Railroad vs. Ryan, 17 Colo., 101.
Ditch vs. Zimmerman, 4 Colo. App., 78.
Pueblo vs. Smith, 3 Colo. App., 386.
Denver R. R. Co. vs. Roberts, 2 *id.*, 313.
U. P. R. R. Co. vs. McDonald, 152 U. S., 262.

In this last case, which went upon error from the Circuit Court of the United States for the district of Colorado, the Court below charged the jury as follows:

"The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as the result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable. * * * It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence."

This instruction was approved by this Court.

It is also urged by the counsel for the defendent in error that any error in the charge of the Court in refusing the instructions asked for by the plaintiffs on trial of this case in the Court below was cured by their failure to except to that part of the charge of the Court which gave the instructions in a modified form. To this we reply, that there was no modification of these instructions. The proposition submitted by the plaintiffs in error in the instructions requested by them was as to the effect of the violation of these rules and regulations upon the question of negligence. The trial court not only refused to give the instructions requested upon this question but omitted entirely to give any instructions whatever upon such question. True it is that the Court charged the jury that the rules and regulations were in force, but in the same connection the jury were instructed in effect that such force was only a shadow, not a reality—the mere *expression of opinion* which had operated as notice of the views of the department as to the danger of transporting diseased cattle, etc.; but nothing was said by the Court to the jury as to the degree of such force or as to the legal effect of such rules and regulations upon this question of negligence, or as to what consideration of them, if any, should be given by the jury in determining such question. (See printed record beginning at the bottom of page 257.)

Where, then, we ask, was there any modification by the trial court of these instructions asked for on the question of negligence arising from the violation of these rules and regulations? And again, even if such modification could be shown,

the exception taken by the plaintiffs below to the charge of the Court was sufficiently definite to save any errors therein contained. This charge, as will be seen (pp. 142–152 of the printed record) was given in paragraphs, plainly separated, and the plaintiffs below objected to "each and every paragraph of them." This is sufficient, as lately determined by the Supreme Court of this state in the case of *Richie vs. People*, 23 Colo., 314. But this doctrine requiring an exception to an instruction which may be a modification of one requested is not the law of Colorado.

K. P. Railway Co. vs. Ward, 4 Colo., 30.

How, then, can opposing counsel contend that "whatever Federal question there may be in the case has been decided in favor of the plaintiffs in error?"

The following four cases are cited in the brief of the defendant in error on this point as to exceptions to instructions:

Beaver vs. Taylor, 93 U. S., 46.
Ayrault vs. Pacific Bank, 47 N. Y., 570.
Walsh vs. Kelly, 50 N. Y., 556.
Regus vs. City of Rochester, 45 N. Y., 129.

The case of *Beaver vs. Taylor*, 93 U. S., 46, is not in point.

In the case of *Ayrault vs. Pacific Bank*, 47 N. Y., 570, after the trial of the case the defendant presented to the trial court sixteen requests to charge, which were refused, and the exception to the refusal is as follows: "To the refusal to charge each of the requests submitted, ***except so far as***

embraced in the charge delivered," and the exception to the charge given by the Court is "to every part of the charge which is *inconsistent with such requests*," and the Court in that case says that the counsel should have taken his exceptions to any omission or refusal to charge as requested, and all which was done in this case upon the refusal of the Court to give the specific instructions presented, after which the exception was taken to the charge of the Court, and which exception was entirely different from that shown in this New York case.

The case of *Walsh vs. Kelley* we have been unable to find. In the case of *Requa vs. City of Rochester*, 45 N. Y., 129, at the close of the trial the defendant's counsel submitted to the Court ten propositions on which he requested the Court to charge the jury. They were in writing and submitted before the charge was given. After the refusal to give such instructions the Court proceeded in its charge to the jury. Some of the propositions were substantially adopted by the Court. At the close of the charge the defendant's counsel excepted to it in all the particulars specified in these written requests "so far as the Court had not charged as requested," and the Court very properly held that such exceptions were unavailing.

"Argument upon the Main Case."

Under this heading, beginning on page 16 of the brief of the opposing counsel, it is sought, first, to repeat all of the previous contention that the Federal questions were decided in favor of the plaintiffs in error, and, secondly, to show that the Court of Appeals rendered a righteous judgment.

As to the righteous character of the judgment in this case, it is not expected that opposing counsel will agree. If our contention that the trial court, in effect, deprived the plaintiffs in error of the benefit of this Congressional legislation and of these Rules and Regulations, by instructing the jury that such rules only operated as the expression of the views of the head of the Bureau of Animal Industry, and, therefore, by necessary inference, had nothing to do with the question of negligence, and if that be all that the plaintiffs below were entitled to have stated to the jury, then, in such case, it may perhaps be true that, so far as the trial court is concerned, we have no right to complain *in this court* of the judgment. Again, if our contention be wrong that the Court of Appeals deprived us of our legal and just rights under this Act of Congress and these Rules and Regulations by an erroneous construction of the Act of Congress as we have contended in our opening brief, and which counsel on the other side have failed to controvert, then it may perhaps be said that, so far as this Court is concerned, the judgment in this case was and is a "righteous judgment;" and, in such case, it would be equally true that during the past fourteen years one of the most important industries in this country has been resting in the belief that its vast interests have been promoted and protected by an Act of Congress and the Rules and Regulations made thereunder, while in very truth it now appears from the judgment in this case, that these Rules and Regulations, even if in force, had no greater significance than an expression of opinion—and,

moreover, that they were without even that significance, because not authorized by the Act of Congress itself, passed nearly fifteen years ago.

Respectfully submitted.

W. C. KINGSLEY,

Attorney for Plaintiffs in Error.

No. 153.

Add'l Reply Brf. of Kingsley for

IN

Filed Dec. 6, 1898.

THE SUPREME COURT

OF THE

UNITED STATES.

MULLEN AND MCPHEE,
Plaintiffs,

vs.

THE ~~GREAT~~ Illinois WESTERN BEEF COMPANY,
Defendant.

153

ADDITIONAL REPLY BRIEF OF PLAINTIFFS IN ERROR.

W. C. KINGSLEY,
Attorney for Plaintiffs in Error.

C. J. KELLY, PRINTER, DENVER.

IN

THE SUPREME COURT

OF THE

UNITED STATES.

MULLEN AND MCPHEE,
Plaintiffs,

vs.

THE ~~GREAT~~ WESTERN BEEF COMPANY,
Defendant.

ADDITIONAL REPLY BRIEF OF PLAINTIFFS IN ERROR.

I.

That there is a federal question involved herein no one denies.

The defendant claims that there are two such questions, while the plaintiffs claim there is only one, viz., the construction of a federal statute, and the rules and regulations made thereunder, while the defendant claims that it properly presented and preserved, and has the right to have determined, the constitutionality of said statute.

II.

Did the defendant present a constitutional question to the trial court?

Did defendant save or waive such question in said court?

Did the defendant present a constitutional question to the Court of Appeals?

Did it save or waive such question?

Does it present any such question here?

First—No such question is presented or hinted at in the answer. The Act of Congress and the rules and regulations thereunder were specially pleaded by the plaintiff, and in answer the defendant not only failed to set up the unconstitutionality of either, but by irresistible implication admitted the validity of both, and affirmatively alleged a full compliance with each. It says:

"Defendant company denies that it transported said cattle * * * from Texas to the state of Colorado * * * in violation of * * * any rule or regulation of the United States Department of Agriculture, or in violation of any Act of Congress, but alleges that any cattle that defendant shipped were transported in strict accordance with the regulations and in pursuance to the particular requirements of such regulations."

(Record, bottom of page 31, top of page 32.)

Second—As shown in the middle of page 50 of record, defendant objected to the introduction of the rules and regulations of the Department of Agriculture of February 5, 1891, as follows:

"As said rules and regulations are not shown to be authorized by Acts of Congress, and any Act of Congress authorizing them is unconstitutional."

"Objection overruled, to which ruling defendant excepted."

We include this exception as it was the only one taken by defendant in relation to this matter.

Third—After plaintiff's evidence was introduced, the defendant made a motion for nonsuit.

(Record, page 190), the 5th paragraph of which is as follows:

"The Act of Congress under which the regulations of the National Board of Health were made is unconstitutional and void, and is itself not authorized by any provision of the federal constitution."

Motion denied and no exception taken.

Fourth—When the evidence was all in (Record, page 253), the defendant asked the Court to give the jury the following instruction:

"10. The Court instructs the jury that the Act of Congress and the rules and regulations made under the same, which the plaintiffs allege to have been violated, are not authorized by the constitution of the United States, and are not valid, subsisting laws or rules and regulations with which the the defendant is bound to comply, and any violation of the same would not of itself be an act of negligence, and you are not to construe a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

"Objected to by plaintiffs as incompetent and immaterial."

There is no entry of any ruling of the Court in reference to this instruction, and no exception of any kind or description was taken by the defendant in reference thereto.

Fifth—The Court's instructions upon the Acts of Congress and the rules and regulations thereunder are to be found in the last half of the Record, page 257 and the first half of page 258. In substance the Court treats the Act of Congress as being perfectly valid, and as to the rules and regulations thereunder the jury were instructed that they:

"Would have the effect to give to this defendant notice that the United States authorities having in charge the animal industries, so far as the government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimball county at that period of the year to Colorado." * * *

There was no exception of any kind taken by the defendant to the Court's charge.

Sixth—When the case on the plaintiffs' appeal was taken to the Court of Appeals, the defendant might have assigned cross-errors under the civil code, which is as follows:

"Exceptions taken to the opinions and decisions of the court upon the trial of a case to the jury shall be deemed to have been properly taken and allowed; and the party excepting may assign for error * * * any decisions or opinion so excepted to * * * ; and the appellee or defendant in error may assign cross-errors in like manner upon the record filed by the appellant or plaintiff in error; which cross-errors shall be heard and the decision rendered thereon at the same time that the cause is considered on the other errors."

Mills' Code, Sec. 386.

No cross-errors of any kind were ever filed or assigned by the defendant in the Court of Appeals.

Seventh—The opinion of the Court of Appeals

found on pages 3 to 9 of the Record shows that no constitutional question was ever considered or passed upon by that court.

Eighth—In all that has been done in preparing this case in the Court of Appeals for this court (See Record, pages 11 to 17) no question was raised or suggestion made by the defendant that this case should go to the State Supreme Court.

Ninth—Had there been a record to justify such action on its part, the defendant might have assigned cross-errors in this court, but it has not attempted to do so.

AUTHORITIES.

The objection made to the ruling on evidence (Record, page 50) and motion for nonsuit (Record, page 190) and instruction 10 (Record, page 253) is *too general.*

We quote from 1 Thompson on Trials, section 693:

"When evidence is objected to * * * if the party would save an objection to the ruling, if adverse to him, such as will be available on appeal or error, he must form his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in the bill of exceptions. He waives all grounds not so specified. The reason of the rule is two fold. First, to enable the trial judge to understand the precise question upon which he is to rule and to relieve him of the burden of searching for objections which counsel is unable to discover or which they see fit to conceal." * * *

(Many authorities cited, several of which are from this Court.)

See also—

Higgins vs. Armstrong, 9 Colo., 57.
Farmers' Ins. Co. vs. Nixon, 2 Colo., App., 266.
D. T. & Ft. W. R. R. Co. vs. Smock, 23 Colo., 456.

We quote from

Hulett vs. M. K. & T. Ry. Co. 46 S. W. Rep. 951.

"Among the instructions asked by the defendant and refused by the trial court was this one:

"'To hold the defendant liable in this case would violate its rights guaranteed by the constitution of the state of Missouri and of the United States, and would deprive the defendant of its property without due process of law.' * * * As to the generalities contained in the instruction mentioned, relative to the constitution of this state and of the United States, it suffices to say that neither the court below nor this court have any call to search through the respective organic laws of the state and nation in order to find out in what particular either of them may have been supposed to have been violated. The Court therefore did right in refusing the instruction." * * *

"Inasmuch as we hold there was no constitutional question presented to the lower court, and inasmuch as the amount sued for and recovered does not come within the appellate jurisdiction of this court, we order this case transferred to the Kansas City Court of Appeals."

There was no constitutional question before the Court of Appeals.

If we are wrong in saying that the general objections made by the defendant in the trial court could not present questions for review, then it could only retain such questions in the record by assigning cross-errors thereon in the Court of Appeals, but this it did not do.

The City of Spring Valley vs. The Spring Valley Coal Co., 50 N. E. Rep., 1067.

The city was sued by the coal company on a state statute, making the state liable for damages done by a mob. Judgment in the trial court was in favor of the city. The coal company appealed to the appellate court, where the judgment below was reversed and (under a statute), judgment rendered against the city for amount of damages sustained by the coal company. City appealed to the Supreme Court. It was held that as the city had reserved no exception to the action of the trial court in refusing an instruction asked by it to the effect that the act was unconstitutional on which the suit was brought, and had filed no cross-errors in the Court of Appeals, that the question of the constitutionality of the statute was not before the Court.

Many cases might be cited in Colorado where the defendant in error has availed himself of assigning cross-errors to his great advantage. We will cite, however, but one:

Knights of Honor vs. Wollschlager, 22 Colo., 214 and 216.

Further, in relation to the duty of assigning

cross-errors and the waiver of all questions upon which such errors are not assigned see:

Beckwith vs. Beckwith, 11 Colo., 568.
Layton vs. Kirkendall, 20 Colo., 236.
Marean vs. Stanley, 21 Colo., 44.
Sargent vs. Board Co. Com., 21 Colo., 158.
Robinson vs. D. & R. G. R. R. Co., 24 Colo., 98.
Persse vs. Gaffney, 23 Colo., 246.
Sargent vs. La Plata Co., 21 Colo., 161.

The defendant's answer raises no such questions, but pleads a compliance with the statute and rules.

Vaughn vs. W. B. R. R. Co., 46 S. W. Rep., 952. In this case, upon a similar plea, the Court declares that the validity of the statute is not in question.

To be available in the Supreme Court of the United States the answer should specially set up the unconstitutionality of the act.

Levy vs. San Francisco, 167 U. S., 175, and authorities cited.

IV.

Under no consideration was it possible for us to take this case to the Supreme Court of Colorado.

Had the Court of Appeals extended its present decision and passed, also, upon the constitutional question against us, still our only redress was to come to this Court.

This Court has repeatedly held that where there are two grounds for the judgment, only one of which involves a federal question and the other

is broad enough to maintain the judgment, the Court will not look into the federal question.

163 U. S., 207.

By the statutes of Colorado the Supreme Court of that State could not take jurisdiction on appeal or writ of error to the Court of Appeals, unless a construction of a provision of the United States or the State constitution was necessary to a determination of the cause.

Had the Court of Appeals also passed upon and decided the constitutional question against us, its opinion would have rested upon two grounds (both federal questions), either one of which would have supported its judgment. Had we taken the case to the Supreme Court of Colorado, the record would have presented one question of which it might have jurisdiction under certain conditions, and another of which it had no jurisdiction. It could only take jurisdiction of the constitutional question when necessary to the determination of the cause, but it would not be necessary for the judgment would have sufficient support upon the other ground. The Supreme Court of Colorado has several times passed directly upon this matter. We now quote at length the opinion of *Madden vs. Day*, 24 Colo., 418.

"In reviewing the judgment of the District Court, the Court of Appeals held that the lien of an attachment writ, secured by its levy before the passage of an act repealing that particular ground of attachment under which the writ issued, was still preserved; although the repealing act contained no special saving clause to that effect. The

conclusion was based upon two grounds: First, that section 11 of article 2 of the constitution forbids the enactment of retrospective legislation, and as the lien, given under the repealed statute, constituted not merely a remedy, but a fixed, substantial or vested right in the creditor, the repealing statute, if interpreted as destroying, or attempting to destroy, such a lien, would contravene said section 11; hence the statute, if held valid at all, must be construed, as it may be, so as to affect, or apply to, such levies only as are made subject to its enactment. Second, the repealing act containing no provision to the contrary, the general saving clause statute (Session Laws, 1891, page 366; Mills' Ann. Stats., sec. 4189a)—whose object is to protect prior rights and remedies—is to be read into it, so as to except from its operation previously acquired liens. *Day vs. Madden et al.*, 9 Colo. App., 464 (48 Pac. Rep., 1053).

"It will thus be seen that a resolution of either one of these propositions against the plaintiffs in error here (who were the defendants in the attachment suit) necessarily determines the case against them. The Court of Appeals, however, elected to rest its decision, not merely upon the interpretation given by it to the statutes, but as well upon the constitutional ground mentioned. The reason for so doing is thus expressed by the learned writer of the opinion:

" 'We have preferred, however, to put our decision on constitutional grounds, as well as on these general considerations. This has been done to protect, as far as we could, the rights of the pres-

ent litigants, as well as to conserve the rights of other suitors whose interests may be affected by this opinion. Unless we are incorrectly informed, this matter has been before the various district courts of the state many times since the act of 1895 went into operation. We are likewise advised by the profession that the district courts have divided on the question, many judges holding one way and many the other, which demonstrates to our mind that the question is a close one, of great perplexity and uncertainty, and one on which courts might well differ and support their conclusions with almost equally persuasive reasons. Our district courts are presided over by men of large experience and learning in the profession, and their opinions are entitled to great weight and respectful consideration, and, while they differ on this question, we regard it as only just and proper that we should unhesitatingly and fully express our views, *decide the constitutional question according to our best judgment, and put our decision on that ground that the parties to this suit, as well as other litigants in the state, may ultimately have the maturer, and probably more satisfactory, conclusion of the Supreme Court upon this question.*' 48 Pac. Rep., 1058.

"The language peculiarly appropriate to the present discussion we have italicised.

"While the motive, as thus expressed, may be praiseworthy, yet it does not follow that jurisdiction may be conferred upon this court, either because the question is one of importance or that the inferior courts and litigants desire a decision by this tribunal. Our jurisdiction, by writ of error or ap-

peal, if it exist at all, is conferred by the constitution or statute applicable to appellate proceedings, and not as the result of a desire, even though universal among subordinate courts, the profession and litigants, that we determine any particular legal proposition.

"This court has repeatedly held that, unless a constitutional question is fairly debatable, and has been properly raised, and is necessary to the determination of the particular controversy, appellate jurisdiction upon that ground does not exist. The case of *Hurd vs. Carlile*, 18 Colo., 461, is practically decisive of this motion. There the Court of Appeals rested its decision wholly upon an interpretation given by it to a statute, although a constitutional question was raised by counsel and pressed upon the Court, which the latter refused to consider, because the case went off upon the other proposition, viz., the meaning of the statute.

"In the case at bar, the Court of Appeals, it is true, predicated its ruling not wholly upon the statutory ground, but upon that and an additional and constitutional one. But the conclusion reached upon either one of these is decisive of the case against the plaintiffs in error here. The one ground is purely statutory; the other involves the determination of the question whether or not this repealing statute is in violation of a constitutional provision.

"The learned Court did not say that the latter question was necessary to a determination of the controversy. Indeed, it virtually held (and this must be so) that the other considerations, viz : the interpretation which it gave to these statutes necessarily determined the very merits of the case against

the party who here seeks a review. But because, in the opinion of the Court, the question determined was difficult, and the principle important, and one that was determined differently by different district courts, the reviewing tribunal proceeded to give another ground for its decision, viz: a constitutional one; which, in case it is essential to a determination of the controversy, invokes the jurisdiction of this Court. The fact that, in the case of *Hurd vs. Carlile*, supra, the Court of Appeals refused to decide a constitutional question, although it was clearly not so essential, does not except the latter case (the one now before us) from the principal announced by us in the former case. In other words, the injection of a constitutional question into a decision of an inferior court, by the latter, when the same is not necessary to a determination of the case, does not thereby invoke the appellate jurisdiction of this Court. In principal the case is like that where the parties themselves, by agreement, attempt to confer jurisdiction. But this is not possible. *Arapahoe County vs. Board of Equalization*, 23 Colo., 137. The feasibility or expediency of securing the decision by this Court is not made by the constitution or the statute a ground of its appellate jurisdiction.

"A decision of a constitutional question is always approached by courts with caution, and more or less reluctance, and is not made unless the necessities of the case require it.

"In a proper case we will not evade the responsibility or duty to determine such questions; on the contrary, we will meet it. But this Court is restricted by law, in its appellate jurisdiction, to cases particularly designated. As this is not one of them,

the writ of error should be dismissed, and it is so ordered."

See also—

Board of Co. Com. vs. McIntire, 23 Colo., 137.

Hurd vs. Carlile, 18 Colo., 461.

McCandless vs. Green, 20 Colo., 519.

ACTS OF CONGRESS AND RULES.

As Acts of Congress, on account of the vast territory over which they operate and the intricacies of the subjects treated, must be quite general in character, it is often the case that they do little more than declare the policy of the government in relation to the subject-matter, and throw upon the executive department or certain officers the enforcing of such policy by appropriate rules and regulations. From the foundation of the government down to the present, such rules and regulations, promulgated under authority of Congress, have always been considered as having the full force and effect of laws. The Acts of Congress in relation to the postoffice department, the public lands, the revenues, etc., etc., do not, in themselves, perhaps, have one-fourth of the laws that are daily applied in such departments. In the early case of the *United States vs. Bailey*, 9 Peters, 238, there was no grant of authority under the Act of Congress to make rules and regulations, and still this Court said, through Justice Story:

"We are of the opinion that the Secretary of the Treasury did, *by implication*, possess the power to make such regulation and to allow such affidavits in proof of the claims. It was incident to his duty. It is a general principle of law in construc-

tion of all power of this sort, that where the end is required the appropriate means is given."

In this case the defendant was found guilty of the penitentiary offense by virtue of a rule that the secretary was held to have power to make simply by implication. See, also, the following cases:

Adams vs. Freeman, 50 Pac., 135.
United States vs. Eaton, 144 U. S., 677.
13 Peters, 498.
101 U. S., 755.
Armstrong, 113 Wall., 154.

In fact, the Act of Congress under consideration declares, in Section 6, that a certain offense shall exist by virtue of the notice provided for in Section 7. In the opinion of the Court of Appeals of Colorado, in the case at bar this language is used:

"It may be considered for the purpose of the case that rules and regulations made by direction of a statute have the authority of the statute itself, and that their violation is in effect a violation of of the statute, but that such may be the case they must be clearly within its terms."

There is in effect no contention between the parties to this suit as to the power of Congress to legislate on the subject-matter, and that it could rightfully grant to the Secretary of Agriculture, and he could rightfully exercise the power of making rules and regulations under such act, but the real contention in that *the rules and regulations introduced in evidence are outside of the authority granted by Congress.* By Section 3 of the act it is declared:

"That it shall be the duty of the Commissioner

of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases."

We shall see presently that the Court of Appeals does not question but what this authority is broad enough, but attempts to avoid the proposition. After disposing of one or two preliminary questions, we will take up the opinion and examine it.

EXCEPTIONS TO INSTRUCTIONS.

It is claimed by the defendant that we are not in a position to complain, on account of the instructions asked by us and refused by the Court or on account of errors in the Court's charge.

The illustration by defendant on page 15 of its argument applies very aptly and with great force to its own condition, as shown by the record, but it fails in every respect to apply to us.

The defendant asked certain instructions. No exception of any kind was taken by it to the Court's action in reference thereto. Neither did it in any manner except to the charge of the Court or any part thereof.

On the other hand we claim that we have properly saved exceptions to the refusal of the Court to give each of the four instructions asked by us, and have properly saved exceptions, also, to each paragraph of the Court's charge. With the authorities cited by the defendant, holding that when the Court instructs orally, the parties excepting to such charge, should call the attention of the Court to the specific matter of objection, so that the Court may know why he excepts, or the reason

of his exception, we find no fault. The reason of the rule is stated in the three cases cited, to-wit: 16 Colo., 17 Colo., and 140 U. S. It will be noticed, however, that 17 Colo. shows affirmatively that the defendant is in error in saying each of the instructions asked by us and refused by the Court, cannot be reviewed, for there the identical question was before the Court, and it treats the exception to instructions refused as being properly saved. The reason given in all three of these cases for refusing to consider the general exception to the charge, does not exist in the case at bar, and we think we are safe in saying that the defendant cannot find a case that will support its contention as applied to our exceptions in this case. When the reason of a rule ceases, the rule itself ceases. Whether the Court instructs orally or in writing, it is entitled to know the position of the parties in reference to its instructions, and, when that position has been fully pointed out to it and made clear and plain, then all that the law requires has been done.

Exceptions do not mean a renewal of the legal argument.

The plaintiff, at the close of the case, says to the Court:

"I ask your honor to instruct the jury on each of the points set forth in the four several instructions, which I now present to you," and then proceeds with his legal argument.

The Court, after instructing the jury, says to the plaintiff:

"I have considered carefully each instruction asked by you, and your reasons in favor of them,

and I differ with you on the law, as you notice from the charge I have given to the jury. I have therefore refused each of the instructions asked."

The plaintiff replies:

"I adhere to the law as stated in each of the instructions asked, and ask your honor to note several and distinct exceptions to your action in reference to each of them. Further, in order that I may doubly save myself, I wish an exception noted to each and every paragraph of the instructions given by the Court."

The Court, in compliance with the request, grants each exception requested.

We now quote the most recent decision of our Supreme Court upon this question, *Richie vs. People*, 23 Colo., 329:

"The instructions in this case, thirty-nine in number, are in separate paragraphs and separately numbered. The exceptions to these instructions were taken as follows: 'And to the giving of which instructions, and to each and every of them, the defendant, by his counsel, then and there duly and severally excepted.' This is the usual and customary manner of taking exceptions where the charge is written and in numbered paragraphs. Perhaps in three-fourths of the cases brought to this court the exceptions are not otherwise taken. That is a better system of practice which requires counsel at the time instructions are given to come forward and minutely specify their objections to the same. But we all know that in the haste of *nisi prius* trials this is seldom done. * * * This Court, while condemning the practice which permits exceptions to be reserved as in this case, has

never refused to consider such exceptions, if made to instructions duly paragraphed and numbered, although it has refused to review such exceptions when the charge is general and delivered orally. In the case of *Miller vs. The People*, 22 Colo., 530, the charge excepted to was given orally as a general charge. In *Keith vs. Wells*, 14 Colo., 321, and *Edwards vs. Smith*, 16 Colo., 529, the instructions were given in the nature of a general charge, and the Court held that a simple statement at the close that counsel desired an exception to each and every instruction was not sufficient. These cases proceed upon the basis that an oral charge is not as carefully prepared as a written charge, and that counsel, being listeners, are more apt to detect errors than the Court. The case of *K. P. Ry. Co. vs. Ward*, 4 Colo., 30; the Court there held that when the instructions are in the nature of a general charge, excepting to each and every of the instructions will not avail, but in that case the instructions *refused*, being numbered, a like exception was held sufficient. In reference to the instructions refused, the Court says: 'They are a series of separate and distinct propositions of law, each standing independent and alone, and against each of which the Court was enabled to write on the margin the words "given" or "refused." They each enunciate some rule of law which the appellant claimed at the trial should be given. As it was necessary for the Court to either give or refuse them separately, each and every instruction was, therefore, *called to the attention* of the Court, and the exception to the ruling of the Court in refusing to give such instructions, and each and every of

them, was held sufficient, although the instructions refused were in that case not numbered.' "

In *Victor, etc., vs. Fraser*, 2 Colo. App., 14–17, the Court says:

"The defendants requested instructions relative to the law of agency (which were correct). * * * That they were entitled to have the jury instructed upon that subject was undoubtedly true. The Court neither gave the instructions asked nor any which were equivalent to them."

In *Finnerty vs. Fritz*, 5 Colo., 181, it is said:

"No specific instructions were given upon either of the foregoing propositions. * * * It is true no such instructions were prayed by the defendant, but the Court rejected instructions which were prayed on the subject of appellee's misconduct, and gave others instead upon its own motion. In such case it became the duty of the Court not only to instruct *correctly*, but fully on the subject."

See also Gibbs vs. Wall, 10 Colo., 153.
Rose vs. Otis, 18 Colo., 59–62.

We confess we do not understand how the defendant can raise the question it seeks to raise upon our exceptions. The Court of Appeals, while it refers to some exceptions upon which it did not pass, because not properly saved, nevertheless does enter into the matter of the exceptions presented upon these instructions and the charge of the court. Having done so and passed upon the statute and the rules and regulations, we cannot see how the defendant can be heard to say that it did not do so rightfully, and as we have properly assigned errors upon the judgment of the Court of Appeals, those assignments must be con-

sidered by this court. It will be noticed in all the cases cited where the court instructed orally, and there was a general exception thereto, or there was a general exception to the written charge, that the reason assigned for not considering such exceptions is that the court's attention was not directed to the particular matter complained of. That reason does not exist in this case. The instructions asked fully advised the court as to the contention of the plaintiff in regard to the law.

ERRORS IN THE OPINION OF THE COURT OF APPEALS.

By its opinion the Court of Appeals held:

First—That the regulations of February 5th and April 23, 1891, never went into effect, because Colorado did not agree to them.

Second—Said rules were made under Section 7, and are only authorized by Section 3, and not by Section 7.

Third—The restrictions upon transporting cattle are in Section 6, and "it contains all the regulations that Congress regarded necessary."

Fourth—"After their arriving (the cattle) in the State," Congress could not further control the action of the shipper in reference to them.

In the case of *M. K. & T. Ry. Co. vs. Haber*, 18 Supreme Court, Rep. 488, these rules and regulations were before the Court and were treated as a part of the law in the case. It seems that no one thought of raising the objections thereto that we have in the case at bar.

The power given by Section 3 of the Act "to prepare such rules and regulations as he might

deem proper for the speedy and effectual suppression and extirpation of the disease referred to," it is conceded is ample to justify the rules and regulations in controversy, and of said rules the Court of Appeals said:

"They were doubtless conceived in wisdom, and if they could be enforced we see no reason to doubt that the results would be beneficial."

Let us examine the Objections of the Court of Appeals enumerated in their order.

It will be noticed that it is made the "duty" of the Secretary to prepare rules and regulations and certify them to "each" state and territory. There is nothing said in the act about such rules being inoperative until each state and territory should agree to them. These rules are laws and regulations established by Congress in relation to interstate commerce, a matter over which the states have no jurisdiction. They do not affect states alone, but also the export trade. The sentence is complete in itself that requires the Secretary to promulgate such rules and regulations. Suppose the states and territories do not respond to his "invitation," are the rules that he was authorized to make, thus made inoperative or repealed? Suppose that a few of the states respond and the rest do not, there is nothing in the statute that says that the rules shall be in force only in those states that do respond or that money shall be expended alone in such states. It reads:

"Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any state or territory in which pleuo-pneumonia or

other contagious, infectious or communicable disease is *declared to exist*, or *such* state or territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a state or other properly constituted authority signify their readiness to co-operate for the extinction of any contagious, infectious or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much money appropriated by this act as may be necessary in such investigation and in such disinfection or quarantine measures as may be necessary to prevent the spread of the disease from one state or territory to another."

If this may be called an exception or a proviso, we find that it all relates to the expenditure of money appropriated and not to the validity of the rules. Such being the case, it can not be said that the rules did not go into effect from the date of their promulgation. The governor of a state may have the authority to offer a reward in the nature of compensation to those who may arrest and convict one of murder, but murder is murder, whether such compensation be offered or not. Again, we notice that the condition in reference to this expenditure is that if the plans of the Commissioner shall be accepted by "any state" in which such contagious or infectious disease is "declared to exist." This language evidently means the Southern States, and it refers to the ~~declaration~~ notification to be made by the Secretary under Section 7. Such disease never has been declared to exist in Colorado. It does not exist there. Colorado, then, was not one of the states that had to agree to this rule, even if the construction of the Court of Appeals was otherwise correct.

The last part of the section, namely, that in reference to the governor of a state, etc., shall signify their readiness to co-operate, etc., the Commissioner is authorized to expend so much money, etc., can not be said in any sense to even intimate that the rules previously promulgated by the Secretary should not be enforced. The rules controlling shipments from state to state must necessarily be enforced in order that the Secretary may properly govern foreign shipments. Give the section such construction as we may, the taking effect of the rules is not made to depend upon the expenditure of the appropriation, for, at best, the Secretary can only spend money when "necessary." The making of an appropriation to carry into effect the Act of Congress was simply intended to add strength to the power given. We have also called attention in our former brief to the fact that the appropriation of 1890 was made without anything being said as to the states accepting the rules, and these rules were made after that appropriation. So these frivolous objections have nothing on which to stand. The rules themselves declare that they are promulgated under the acts of 1884 and 1890.

Such a construction of a statute as is here contended for will never be given by a court unless it is impossible to escape such a conclusion.

United States vs. Langston, 118 U. S., 389.
Wood vs. United States, 16 Peters, 342.
Sutherland on Statutory Construction, Sections 148, 149, 150, 151, 152, 153 and 217.

The second proposition laid down in the opinion of the Court of Appeals is: That the rules

were made under Section 7, when they were only authorized by Section 3. This proposition is used as a two-edged sword by the Court—to strike down the rules when Section 7 is referred to, as being without authority thereunder, and when Section 3 is referred to, to declare that the power granted by it has never been exercised.

So far as notice of the infected district is concerned, it is admitted that the rule was proper under Section 7, and that the notice was operative as being given under that section, but it will be noticed that the rules refer to both Acts of Congress and call attention to the titles thereof.

If the Secretary had not referred to any Section or Act of Congress, will it be said his rules would not be operative? He might have said, "by authority of law," or he might have remained perfectly silent as to his authority. Suppose, by mistake, he should miss the section of the act in attempting to refer to his authority, does it vitiate the law that actually conferred such authority? The question is not whether the Secretary correctly cited his authority, but whether he had the authority or not. Suppose that "A," having a power of attorney to sell and convey lands of "B," in attempting to exercise this authority deeds as attorney in fact, and leaves his power of attorney to speak for itself, is not this sufficient? On the other hand, suppose that he attempted to describe it, and he made a mistake, as to its date, the book in which it was recorded and the page of the book, would the deed made by him be void? or would it simply be a question as to whether in "fact" he was authorized to make such a deed, regardless of

the mistake he may have made in describing his power? Let us bring the illustration nearer. Suppose he had given correctly the date of his authority and the book and page where recorded, but had referred to one or two sentences therein for the power he claimed to exercise, and it should turn out that those particular sentences did not justify his action, but other sentences following did, beyond question, justify such action, would his act be void? It seems to us these questions are quite plain and simple. They carry us back to the real matter of contention, as to whether the Secretary had authority or not. It is the substance we should look for, and not the form.

Davis vs. Bruce, 82 Ill., 544.
Warner vs. Ins. Co., 109 U. S., 357.
Lee vs. Simpson, 134 U. S., 572.

Third—It is said by the Court of Appeals that the restrictions of Section 6 contain all the regulations that Congress thought necessary, hence the secretary cannot by rules add others. If this be so, why did Congress confer upon the secretary power to make rules, and make it his "duty" to prepare such rules and regulations as he might deem proper. Congress did consider something else necessary than the relief that might possibly be obtained in Section 6. This is sh[illegible] by every section in the act. Under Section 6 [illegible]e defendant might have been convicted if he brought diseased cattle into this state from Texas, knowing they were affected with fever. This section simply provided as to what should constitute a crime. Suppose the defendant did not know the cattle were

diseased. Suppose that he claimed that he was shipping cattle that were perfectly sound. The secretary's rules would cover the shipment of sound cattle. They add certain items of care that should be observed in the shipment of all cattle, whether diseased or not, or whether the shipper knew of the disease or not. This care in the opinion of the secretary was necessary, owing to the prevalence and ravages of this disease, in order to suppress and extirpate the same. But we have seen that Congress did not aim that Section 6 should be the only remedy provided for, as stated by the Court of Appeals, otherwise the authority to the secretary and the appropriations made would be wholly unnecessary. It might be further said of these rules that they are directly in line with the Act of Congress and its authority in reference to interstate commerce, for they aim to protect other cattle in other states that are the subjects of interstate commerce at the time when they are brought in contact with the diseased cattle.

Fourth—The fourth and last objection given in the opinion of the Court of Appeals, is that after the cattle arrived in this state Congress, (and, therefore, the Secretary's rules) could have no effect upon the liability of the shipper in reference to them. Such a construction of the power of Congress would simply deprive it of the privilege of doing any good, while at the same time, the subject matter being within its particular province, state legislatures are necessarily restricted. This court has never to our knowledge so interpreted any power of Congress, and we have faith that it never will. The man that undertakes to ship cattle from

Texas to Colorado, in accordance with the law of Congress must be held to comply with the act under which he claims protection. It was said in *Barnett vs. Barber*, 1 Littell (Ky.), 396:

"We admit that an individual whose rights are prejudiced by a law conflicting with the Constitution, has a right to demand of the judiciary a decision on the validity of the law. * * * But such individual ought to show that his constitutional rights were infringed without his consent, and ought not to jeopardize his rights voluntarily by attempting to proceed under a law, and take the benefit of it, and then turn around and complain of constitutional injuries."

See also Hansford vs. Barber, 3 A. K. Marsh, 515.

If Congress can fix the terms and conditions that so regulate such commerce, if its authority does not stop at state lines, but enters the state together with the article transported, and guards it against the operation of state laws for months, and it may be for years—that is, so long as the article shipped retains its original character, and until by barter and sale or the direct effect of internal commerce, it has become so mixed and mingled with such internal commerce as to be a part thereof; then we are unable to see why Congress may not make regulations and rules as to how it shall be so handled up to the time that it has completely lost its identity as an article of interstate commerce. Especially is this true when the expressed object of the rules in question is to protect other objects of interstate commerce. The man from California shipping cattle through Colorado or the Montana man who has cattle upon its ranges for shipment, or the

Colorado man preparing his cattle for shipment to the Eastern market, have as much right to protection as the Texas man who brings his cattle into this State, and these rules refer especially to the protection of cattle that are to be shipped to an Eastern market. This power of Congress will be construed so that it may be of some benefit, and a benefit to all. We think the decisions of this Court come fully up to what we claim.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196.
Leisey vs. Hardin, 135 U. S. 100–108.
White's Bank vs. Smith, 7 Wall, 655–6.
United States vs. Boston & A. R. R. Co., 15 Fed. 209–211.
United States vs. State, 91 U. S. 279.

Respectfully submitted,

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